HANDLING POST-AWARD PROBLEMS

As we all know, the primary mission of Team C4IEWS is the acquisition of command, control, communications, intelligence, and electronic warfare equipment. Although it is important to timely award a contract, once the contract has been awarded, it is equally important to assure that the item or service contracted for reaches the ultimate user in a timely manner and in accordance with the contract requirements. This is the world of contract administration.

This article will address some of the post-award problems that those in the Government, but more specifically those individuals involved in the acquisition process, may face.

Many times, once the contract is awarded, the Administrative Contracting Officer (ACO) performs the hands-on function of administering the contract, making sure that the contractor complies with the terms and conditions of the contract. The Procuring Contracting Officer, however, never totally "bows out" of the picture.

Some of the most common types of post-award problems likely to be encountered in a fixed-price production contract are constructive changes, delays in contract performance, and acceptance of non-compliant items.

Any Government conduct that causes the contractor's costs of performance to increase can entitle the contractor to an increase in the contract price, either through an equitable adjustment or "constructive change" theory. The constructive change approach is based on the concept that whatever Government conduct (delay, delivery of late or defective Government Furnished Material, etc.) caused the increased costs is "constructively" equivalent to a formal change issued by a Contracting Officer under the "Changes Clause", FAR 52.243. The "equitable adjustment" approach is not tied directly to a contractual clause, but rather is based on the theory that fundamental fairness requires that a contractor be reimbursed for financial impact caused by Government actions. In either case, the contractor must provide the Contracting Officer with sufficient information to demonstrate two things: "entitlement" (that is, what facts support its contention that the Government is responsible for the increased costs) and "quantum" (that is, the auditable data supporting the amount claimed). The Government should always be willing to pay its contractors what they are entitled to, but often the parties cannot agree as to whether entitlement or quantum have been adequately demonstrated. This may result in a dispute.

After discussion, if the Government and the contractor continue to disagree on a mutually acceptable resolution of the matter, the Contracting Officer should issue a timely final decision letter setting forth the reasons why the Government rejected, in whole or in part, the contractor's position. For claims of $50,000 or under, the Contracting Officer shall issue a decision letter within 60 days. For certified claims over $50,000, the Contracting Officer shall issue his or her decision within 60 days or notify the contractor of a reasonable time in which a decision will be rendered. Additionally, the letter should set forth the procedures by which the contractor may appeal the Contracting Officer's final decision.

Under the Contract Disputes Act of 1978, the contractor has two avenues of appeal. A contractor can appeal within 90 days of receipt of the final decision to the Armed Services Board of Contract Appeals (ASBCA) or within 12 months to the U.S. Court of Federal Claims. Of course, at any stage in the process, the parties can mutually agree to use Alternative Dispute Resolution techniques to resolve the dispute.

Sometimes the contractor fails to deliver; hence the contractor has defaulted on its contract with the Government. Contractor defaults are governed by the "Default (Fixed Price Supply and Service)" Clause, FAR 52.249-8 for fixed-price production contracts. The default clause is the ultimate method of dealing with the contractor's unexcused present or prospective failure to perform in accordance with the contract specifications or delivery schedule.

The standard default clause sets forth three different grounds for terminating a contract: 1) failure to deliver the product or complete the work or service within the stated time; 2) failure to make progress so as to endanger performance of the contract; or 3) breach of any other contract provision.

Typically, before the Government terminates a contract, the Contracting Officer will issue either a Cure Notice or a Show Cause Letter to ascertain why the contract should not be terminated for default. Normally, a Show Cause Letter is utilized in cases where a contractor has failed to make a scheduled delivery and assists the Contracting Officer in determining whether the contractor's failure to deliver was beyond its control. (Note that certain excuses, such as a sub-contractor's failure to perform, are deemed *not* to be beyond the prime contractor's control.) Use of a Show Cause Letter is not a mandatory pre-requisite to termination based on a failure to deliver, but it is the much better practice.

Default termination based on anything other than a failure to deliver *must* be preceded by a "Cure Notice". This is a written notification of the condition(s) giving rise to the default, a direction as to what must be done to cure that condition(s), and which allots at least 10 days in which to do so. Decisions to terminate for default are appealable to either the ASBCA or U.S. Court of Federal Claims as outlined above.

An alternative to termination, if it would be in the Government's best interests, would be to revise the delivery schedule (in the case of a failure to deliver) or relax the contract requirements in some way so as to address whatever issue gave rise to the Show Cause Letter or Cure Notice. In either case, those actions should be accomplished by bilateral modification, and the Government should require adequate consideration (such as a downward adjustment in the contract price, additional units, accelerated deliveries, etc.) in return for its willingness to forgo its right to terminate.

It can't be overemphasized that, whenever a post-award issue is negotiated to resolution, whether it be a claim for increased costs or a possible default termination situation, that

resolution should be made part of a bilateral modification to the contract that contains appropriate release language that absolves the Government and all of its personnel involved in the action from any future liability for the subject matter. Without such language, the deal the Contracting Officer thought was going to be the last word on the issue could turn out to be just the first chapter in a long, time consuming and costly fight.

The last post-award problem to be discussed is the situation where the Government accepts an item and it doesn't perform as expected. FAR 46.501 states that "[a]cceptance constitutes acknowledgement that the supplies or services conform with applicable contract quality and quantity requirements . . ." Nevertheless, there are certain circumstances when acceptance is not final.

The Government's right to revoke acceptance falls into three main categories: latent defects (those that are not discoverable by reasonable inspection); fraud or gross mistake amounting to fraud.

A review of the case law in this area shows that revocation of acceptance is, although not impossible, extremely difficult absent very clear facts in the Government's favor. In a situation where the defective condition is such that the only inspection that would have revealed it would have destroyed the items, the Government may be able to successfully revoke its acceptance. Similarly, evidence of intentional concealment by the contractor would allow for revocation of acceptance (and perhaps criminal prosecution or debarment).

The most important points to take away from this discussion are that our responsibilities don't end with the award of the contract. Good communication within the Government and between it and the contractor through the application of effective "Partnering" processes will avoid many post-award problems. When they can't be avoided, however, the Legal Office can help the Contracting Officer get to a resolution that will be both fair and final.

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